STATE OF MICHIGAN

COURT OF APPEALS

SHELLY A. BUSH and JOHN BUSH, Plaintiffs-Appellants, v STEVEN E. GOREN and GOREN, GOREN & HARRIS, P.C., Defendants-Appellees.	UNPUBLISHED February 1, 2011 No. 294779 Oakland Circuit Court LC No. 2009-099884-NM

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition in defendants' favor in this legal malpractice case. We reverse and remand.

I. Facts

Plaintiffs assert that they contacted defendant attorney and his firm about a possible medical malpractice claim in 2005 concerning a cardiac surgery that was performed on Shelly Bush[1] on August 24, 2004. According to plaintiffs, the surgery included participation in a research study to evaluate the safety and efficacy of a new, unapproved, vascular closure device that plaintiff maintains was presented to her as a way to shorten the time she would have to remain in the hospital. According to plaintiff, she was not advised by hospital personnel that, under the terms of the study, she was not permitted to participate in it due to the fact that she was a nursing mother. Plaintiff alleges that, as a result of the insertion of the device, she "experienced severe medical complications including a ruptured femoral artery, enormous pain and suffering, lifetime occupational disability, very high medical expenses, mental anguish and emotional distress."

[1] The remainder of this opinion refers to plaintiff Shelly Bush as the singular "plaintiff" and defendant attorney as the singular "defendant" as appropriate.

According to the complaint, after plaintiff contacted defendants, she provided the information concerning both the surgery and the use of the medical device. A paralegal in defendant's firm sent a letter to plaintiff, which in part confirmed that their conversation was "regarding [Plaintiffs'] potential medical malpractice case and the possibility of product liability." Plaintiffs subsequently entered into a contingency fee arrangement with defendants. Plaintiffs maintain that the fee agreement referenced both a medical malpractice claim and a possible product liability case.

On June 5, 2006, defendant sent plaintiff a letter explaining that he had had her medical records analyzed by two interventional cardiologists and one vascular surgeon, and that each of the experts "indicated that they cannot support malpractice in their respective specialties." The letter then related defendant's decision not to proceed with plaintiff's case. The letter further provided:

> This is not to say that you do not have a legitimate and proper claim, or that other lawyers would not be interested in taking your case. You have the right to contact another attorney.
>
> Please be advised that you must file a lawsuit before the statute of limitations expires or your claim will be forever barred. Based on the records, **the statute of limitations may expire as early as** August 12, 2006. You should understand that there are certain requirements and deadlines that must be met in order to file a lawsuit. A Notice of Intent to file a claim must be sent by certified mail before the statute expires in order to preserve your legal right to file a lawsuit. Also, appropriate medical experts must submit an Affidavit of Merit stating there was malpractice and the affidavit may require certification. The notarized and certified affidavits must be submitted with the lawsuit.
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> **If you are interested in pursuing this claim, you should not delay in contacting another lawyer.** (Emphasis in original).

In their complaint, plaintiffs maintain that this letter, which appeared to deal only with plaintiffs' medical malpractice claim, indicates that the defendant "apparently either forgot about or quite consciously elected not to pursue these product liability claims on behalf of [plaintiffs]." Plaintiffs also maintained that defendant failed to correctly advise them of the longer three year statute of limitations for the product liability action.

Plaintiffs alleged in the complaint that they then attempted to contact other attorneys but that those attorneys declined to become involved in the case because of the mere two-month time frame remaining in which to proceed with the medical malpractice action. Plaintiff contended that neither she nor her husband knew enough to tell the attorneys they contacted that fourteen

months still remained in the statute of limitations for the product liability claim.[2] The complaint specifically alleged that defendants violated their duties to plaintiffs in not advising plaintiffs of the products liability statute of limitations, or possibly not even calculating this statute of limitations, and "abandoning the products liability analysis . . . without discussion of that analysis with either of their clients."[3]

Plaintiffs filed their complaint on April 10, 2009. Defendants did not file an answer, but subsequently filed a motion for summary disposition on June 18, 2009. Defendants sought summary disposition pursuant to MCL 2.116(C)(7), (8) and (10). Defendants alleged that plaintiffs could not maintain the action because defendants' representation of plaintiffs ended more than two years prior to the filing of her complaint, and plaintiffs had pled no facts to support the extension of the limitations period under the discovery rule. Defendants also alleged that plaintiffs' claims were barred under the attorney judgment doctrine, because defendant acted in good faith and in an honest belief that his acts were proper. In support of the motion, defendants attached defendant's affidavit, in which he averred that he was aware of the statute of limitations for the product liability claim, but had decided not to inform plaintiff of "several statutes of limitations," and instead "chose to advise [plaintiff] of only the earliest date that the statute of limitations might expire" because he "thought it critical that [he] explain the importance of the statute of limitations to [plaintiff] and emphasize the need for her to immediately contact an attorney." Defendant stated that he thought plaintiff would advise any attorney that she contacted about the use of the medical device, and that the other attorney would know the statute of limitations for a product liability action. Plaintiffs responded, providing affidavits in support of their contrary positions on both issues.

Following a hearing, the trial court granted defendants' motion for summary disposition. It found that plaintiffs were "essentially [seeking] to hold Defendants liable for the new attorneys' inability to recognize the potential and timeliness of the products liability claim on their own[,]"[4] and held that defendant had not breached a duty to plaintiffs.

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[2] In her later affidavit, plaintiff contended that, each time she contacted an attorney, she told them she was calling about a medical malpractice case involving surgery, was asked about the statute of limitations and, after reading defendant's letter to the attorney, the attorney would decline to take her case because the time was too short. She also stated that none of the attorneys would even meet with her or her husband about the matter.

[3] As discussed further below, plaintiffs apparently subsequently reached a settlement with the product's manufacturer while unrepresented by an attorney. However, plaintiffs contended in their brief below that plaintiff thought that the settlement was a "gift" to her and that she could not receive full compensation because the products liability statute had run.

[4] To the degree that the trial court's ruling could be read to suggest fault on the part of the other attorneys plaintiffs contacted, we note that no party is claiming that an attorney-client relationship was established between plaintiffs and any of these attorneys.

II. Attorney Judgment Rule

Plaintiffs first argue that the trial court erred in finding as a matter of law that defendant's actions were protected by the attorney judgment rule.

We initially note that the trial court's opinion indicates that the court granted summary disposition of plaintiffs' claim pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief may be granted). A motion under MCR 2.116(C)(8) relies on the pleadings alone, and all well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dept of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). Such a motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*. at 486-487.

However, as noted above, defendants did not file an answer, but instead first submitted their motion for summary disposition, which sought summary disposition under MCR 2.116(C)(7), (8) and (10), and included defendant's affidavit that he believed that plaintiff would advise other attorneys as she had him and that they would be aware of the second statute of limitations. Both parties also went outside the complaint itself and referenced the affidavits submitted by the parties while arguing their positions at the hearing below. The trial court's ruling largely relied on defendant's assertions in his affidavit, i.e., that it was reasonable for defendant to assume that plaintiff would provide any future attorney with the information that she had provided defendant and the new attorney would recognize the potential and timeliness of the product liability claim. Not only did the court's ruling presume the truthfulness of defendant's assertion that he considered plaintiffs' product liability claim in his decision in what to tell plaintiff, and consciously decided to omit any reference to the product liability claim, it ignores the second assertion in the complaint, i.e., that defendant "forgot about" or "abandoned" the products liability claim. Thus, despite the trial court's assertion to the contrary, it clearly relied on information outside the complaint to reach its decision. "[W]here, as here, the trial court considered material outside the pleadings, this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency of Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007), citing *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

MCR 2.116(C)(10), "tests the factual support for a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). See also,

Simko v Blake, 448 Mich 648, 655; 532 NW2d 842 (1995). If there is an attorney-client relationship, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law. *Simko*, 448 Mich at 655-656, quoting *Eggleston v Boardman*, 37 Mich 14, 16 (1877).

The trial court, citing *Simko*, dismissed plaintiffs' legal malpractice claim. The plaintiff in *Simko* was convicted of possessing over 650 grams of cocaine. *Simko*, 448 Mich at 650-651. This Court overturned Simko's conviction, albeit after Mr. Simko spent more than two years in prison. He then sued defense counsel for allegedly failing to produce certain trial witnesses, including Simko's personal physician, and failed to ascertain the name of the hotel where Simko had stayed the day before his arrest. *Id*. at 651-653. He maintained that counsel's errors led to his initial conviction, but the circuit court granted summary disposition in the defendant's favor, on the ground that an attorney "cannot possibly be held responsible for the acts of an unreasonable jury." *Id*. at 653.

Our Supreme Court ultimately affirmed the circuit court's ruling. It held that "an attorney is never bound to exercise extraordinary diligence," or "insure or guarantee the most favorable outcome possible." *Id*. at 656. Nor must he "predict infallibly how a court will rule." *Id*. at 658. The Supreme Court held that tactical decisions such as what witnesses to call do not constitute malpractice providing they are taken in good faith and will full knowledge of the law. *Id*. at 660.

Defendant argues that he was well aware of the applicable facts and law and provided plaintiff with accurate, albeit incomplete, advice given in good faith. He asserts that, and the trial court held that, therefore, under *Simko*, his actions cannot constitute malpractice. We do not agree. In drafting his closing letter to his clients, defendant was not making a tactical decision in which he had to choose between courses of action in an adversarial situation whose viability turned on many factors beyond his control such as the actions of an opposing counsel or the unknown views of a judge or jury. Rather, defendant, in the controlled environment of his own office was advising plaintiffs, whose case he had declined, what options they retained and what they had to do to exercise those options. We reject the argument that giving only partial advice about a matter as fundamental as the applicable statute of limitations when sending a closing letter to a client can be viewed as a matter of tactics.[5] An attorney and his or her advice certainly need not be perfect or infallible. However, as noted in *Simko*, "all attorneys have a duty to behave as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances." *Id*. at 656 (internal quotation omitted).

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[5] We emphasize that we are not creating a blanket rule requiring attorneys to advise clients or potential clients about every possible claim that might be brought, and the statute of limitations applicable to those claims. However where, as here, the attorney was specifically retained to pursue specific claims on behalf of his clients, the attorney judgment rule will not simply excuse his actions in providing incomplete advice concerning those claims.

Here, viewed in the light most favorable to plaintiffs, the evidence creates a question of fact as to whether defendant acted with professional negligence when he failed to inform them of the statute of limitations for their products liability claim, either because he abandoned the claim entirely or consciously decided not to transmit the information to plaintiffs. Taken alone, defendant's June 5, 2006 letter supports a finding that defendant abandoned or forgot about the product liability action. It contains no explicit mention of the action. The stated reason for abandoning plaintiffs' case is that defendant's consultants indicated "that they [could not] support *malpractice in their respective specialties*." (emphasis added). Moreover, in addition to the date, the portion of the letter concerning the statute of limitations provided that plaintiffs would have to file a notice of intent, and submit an affidavit of merit to support their claim. These are requirements that pertain to medical malpractice actions, not product liability actions. Thus, on its face, defendant's letter contradicts his assertion that his decision to omit the product liability statute of limitations was a conscious one.

Even if defendant's assertion is believed, however, plaintiffs' evidence presents a factual question as to whether the decision to omit this information constituted professional negligence. A conscious choice by defendant not to pursue plaintiffs' product liability claim and the transmittal of that decision to plaintiffs would fall within the definition of a strategic assessment protected under the rule, even if plaintiffs had a viable product liability claim. However, where an attorney-client relationship has been established, the attorney's closing advice to the client whose case he has declined must comport with the standard of practice. Plaintiffs presented the trial court with affidavits from two attorneys. One stated that, in his professional opinion, the standard of practice for a lawyer in defendant's position required him to tell plaintiff of both statutes of limitations applicable to her claims and that the failure to do so constituted a breach. The other relied on Michigan Rule of Professional Conduct (MRPC) 1.4(b)[6] and a Michigan Ethics Opinion discussing that rule to state that he concluded that defendant's action violated that rule. Based on the rule and the opinion, he also opined that plaintiff could not make an informed decision about how to pursue her products liability claim when she was not informed of the applicable statute of limitations; and that defendant's position that he was justified in withholding information from plaintiff on the ground that he believed it to be in her best interest was without merit.

Plaintiffs' claims and evidence, if believed by a jury, are sufficient to allow a reasonable jury to conclude that defendant failed to exercise reasonable care, skill and diligence in representing them. [7] Although defendant gave plaintiffs advice that was consistent with the law

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[6] This rule provides, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[7] We specifically disagree with defendants' contention that plaintiffs' affidavits are deficient because plaintiffs' proffered experts are not qualified to testify "as an expert to the standard of care applicable to a medical malpractice attorney in preparing a rejection letter." Defendants provide no support for the proposition that, as in a case involving medical malpractice, a plaintiff

as it pertained to their possible medical malpractice claim, the issue remains whether he behaved in a manner consistent with the fiduciary standard of care as to the product liability claim. We concur with this Court's previous observation that a lawyer may not "act with impunity and avoid malpractice liability merely because professional judgment of the attorney is at issue. Since everything an attorney does is based on his professional judgment, a contrary holding would seriously undercut the tort of legal malpractice." *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 694-695; 310 NW2d 26 (1981). The attorney-judgment rule does not automatically shield an attorney who provides his client with a partial legal analysis or position. And while the trial court refused to fault defendant "for the new attorneys' inability to recognize the potential and timeliness of the products liability claim on their own," other possible malpractice, or plaintiffs' possible contributory negligence, while perhaps a proper factor in limiting plaintiffs' recovery, is not a shield for defendant's own failure to exercise reasonable care, skill, and diligence, if proven.

In summary, whether defendant exercised reasonable care, skill and diligence under these circumstances presents a factual question that must be resolved by a jury.

III. Statute of Limitations

Defendants also argue that this Court should affirm the trial court's decision because the statute of limitations had run on plaintiffs' malpractice claim. The trial court did not reach this issue below. Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489

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in legal malpractice cases must present experts whose "specialties" or "subspecialties" match those of the defendant's in order to be qualified to testify concerning the applicable standard of care.

We further find unpersuasive defendants' argument that plaintiffs cannot rely on an alleged violation of the MRPC in support of their claim. A violation of the rules cannot "give rise" to a cause of action for enforcement or for damages caused by a failure to comply, as this Court noted in *Watts v Polaczyk*, 242 Mich App 600, 607 n1; 619 NW2d 714 (2000). See also MRPC 1.0(b). However, it does not follow that the rules are wholly irrelevant. Plaintiffs' claim for malpractice is not based on any violation of the ethical rules and does not seek to enforce any rule, both of which are prohibited by MRPC 1.0(b). But while violations of the MRPC cannot alone form the basis for an action for malpractice, the MRPC are admissible as evidence in a malpractice action, where they are relevant to the alleged deficient conduct at issue and where their probative value is not outweighed by their prejudicial effect. MRPC 1.0(b); MRE 401; MRE 403. Plaintiffs essentially assert that the MRPC are relevant to the scope of defendant's duty to plaintiffs and as to whether defendant met the applicable standard of care. Defendants do not argue that the prejudicial effect of the rules outweigh their probative value in the instant case. Therefore defendants have not shown that plaintiffs cannot rely on MRPC 1.4(b), or any other applicable rule, as well as expert opinion based upon this material, in support of their claim concerning whether defendant committed malpractice.

(1999). "[W]here the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). Here, however, we find a remand necessary to address disputed questions of fact concerning this issue.[8] The limitations period for a legal malpractice claim or action is two years from the date the claim accrued or arose, or within six months of the date that the plaintiff discovers or should have discovered the existence of the claim, whichever occurs later. MCL 600.5805(6); MCL 600.5838(2); *Wright v Rinaldo*, 279 Mich App 526, 529; 761 NW2d 114 (2008), citing *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006). The determination of when plaintiff should have discovered a possible cause of action focuses on resolving whether "a reasonable person in plaintiff's circumstances [would] have discovered the claim." *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993) (emphasis in original).

Plaintiffs respond to defendants' statute of limitations argument by contending that they did not discover that they had a possible cause of action against defendants until October 13, 2008, after they consulted another attorney, apparently in response to John Bush's belief that the initial statute of limitations on the medical malpractice claim could be extended if they had new information about the claim. In support of their motion, in addition to their own affidavits, they presented one from the attorney they consulted. This attorney averred that when plaintiffs approached him they were interested in and completely focused on the medical malpractice litigation against the doctors and hospitals involved in plaintiff's treatment, were "completely taken by surprise" when the attorney informed them that they might have a claim against defendants, and that "based on their reaction and [the] conversation, they had no idea before [he] mentioned it to them that they did or might have a claim against [defendant]."

On appeal, defendants maintain that plaintiffs' averments and alleged lack of knowledge were not reasonable as a matter of law, especially in light of plaintiff's apparent settlement with the product manufacturer. We disagree. Plaintiffs acknowledged below that plaintiff negotiated with the manufacturer without an attorney. However, no mention is made in the record of when her negotiations with the manufacturer started, ended, or what was stated during the negotiations by plaintiffs or the manufacturer. We are not prepared to hold as a blanket proposition that an attempt by an individual who believes she has been injured by a product to ask the manufacturer to reimburse her for some of the costs of her injuries is, without more, incompatible with a reasonable belief that the individual could not force payment through a lawsuit if the manufacturer would not do so voluntarily because the statute of limitations had run. We are not

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[8] "[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court also reviews de novo." *Wright v Rinaldo*, 279 Mich App 526, 533 n 3; 761 NW2d 114 (2008) (internal quotation marks and citation omitted). See also *Kermizian v Sumcad*, 188 Mich App 690, 693-694; 470 NW2d 500 (1991) (Adopting rationale in *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990), that, where there is a dispute concerning the date when a plaintiff discovered, or reasonably should have discovered, his cause of action, this factual determination is to be made by a jury.)

foreclosing defendants from raising this issue on remand, or the trial court from determining that plaintiffs' belated discovery was not reasonable in light of the evidence presented by the parties. However, looking at the sparse record before us, defendants have not established at this point that, as a matter of law, plaintiffs' actions should have caused them to discover their possible malpractice claim against defendants prior to their meeting with an attorney on October 13, 2008.

We thus reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro